

[2 NOVEMBER 23. 1770.

See

UNTO THE RIGHT HONOURABLE
 THE LORDS OF COUNCIL AND SESSION,
 THE
 PETITION

POOR JACOBINA MACFARLANE, Spouse
 to *Andrew Currie*, Weaver in *Portf-*
burgh, and him, for his Interest;

HUMBLY SHEWETH,

THAT *Archibald Macfarlane*, mariner in *Leith*,
 was, sometime in the month of *May 1750*,
 married to *Elizabeth Spence*, daughter of *Wil-*
liam Spence, tanner in *Leithgow*, in conse-
 quence of a contract entered into between the said *Archibald Macfarlane*, and *Elizabeth Spence*, with concurrence of
 her father.

May 22d and
 25th, 1750.

In this contract, *Archibald Macfarlane* became bound
 to provide and have in readiness, of his own proper
 means and money, to the amount of 300 l. *Sterling*
 money, and to lend, or otherwise to ware, bestow, and
 employ the same, and to take the rights and securi-
 ties, not only thereof, but, also, of whatever lands, heri-
 tages, tenements, annualrents, interest, household fur-
 niture, debts, sums of money, goods and gear, what-
 soever,

" soever, that shall be conquest or acquired, and shall any
 " way accresce or befall to the parties, or either of them,
 " in, with, and during the standing of this marriage,
 " (all which are hereby provided and secured) to, and in
 " favours of the said *Elizabeth Spence*, his betrothed spouse,
 " and to the longest liver of them two, in conjunct fee and
 " liferent, and to the children to be procreate betwixt them, in
 " fee; who failing, to the said *Archibald Macfarlane*, his
 " own heirs, executors, or assignies, in fee."

On the other part, *William Spence* " obliges him, his
 " heirs and successors, at the first term of *Whitsunday* or
 " *Martinmas*, after the death of the survivor and longest
 " liver of himself and *Elizabeth Johnston* his spouse, to
 " pay and deliver to the said *Archibald Macfarlane* and *Eliz-
 " abeth Spence*, according to the destination underwritten,
 " the sum of 300 merks *Scots* money, with 60 merks
 " money foresaid of liquidate penalty, in case of failzie,
 " and annualrent of the principal sum, after the term of
 " payment, until payment thereof; and as the said *Archibald
 " Macfarlane* has instantly received 400 merks *Scots*,
 " of the said *Elizabeth Spence*, her own money; so that
 " sum, with the 300 merks above mentioned, payable by
 " *William Spence*, making in all 700 merks *Scots*, is, by
 " mutual consent of both parties, destinated to be applied,
 " and is hereby provided and secured, to, and in favour
 " of the said *Archibald Macfarlane* and *Elizabeth Spence*,
 " assedate spouses, and to the longest liver of them two, in
 " conjunct fee and liferent, and to the children to be pro-
 " create betwixt them, in fee; who failing, to the said *Eli-
 " zabeth Spence*, her heirs, executors, or assignies, in fee."

Os. 9.
1751.

Of this date, *Archibald Macfarlane* made a further settle-
 ment of his estate, by executing a disposition of his whole
 effects, real and personal, in favours of his wife and chil-
 dren, and, failing of them, to the petitioner *Jacobina Mac-
 farlane*, his only sister.

The

The dispositive clause of this deed is in these words :
 " I hereby assign and dispoⁿe to and in favours of Eli-
 zabeth Spence, my beloved wife, and the children, one or
 more, procreate, or to be procreate betwixt us ; whom
 failing, to Jacobina Macfarlane, my sister, spouse to An-
 drew Currie, linen manufacturer in Edinburgh, all and
 whatsoever debts and sums of money, bonds, bills,
 &c. and in general, all and whatsoever means and
 estate, real or personal, that shall be due or belong to
 me, or wherein I shall have any interest the time of my
 decease." It contains also the following nomination of
 executors : " I hereby nominate and appoint the said Elizabeth
 Spence, and the children, one or more, procreate, or to be pro-
 create betwixt us ; whom failing, the said Jacobina Mac-
 farlane, my sole executors and universal legatars ; with power
 to the said Elizabeth Spence, she being on life at the time
 of my decease, to confirm my testament, and give up
 inventories, intromit with, uplift and discharge, and to
 use and dispose of all my means and effects, and to ap-
 ply the same for her own use and behoof, and for the use
 and behoof of our said children, by such proportions as
 she shall think fit ; she the said Elizabeth Spence always
 having the sole administration of the whole during her
 widowity, and the nonage of her children, and, failing
 of them, to her own use and behoof allenaryly ; hereby
 secluding and debarring all others from the said office of
 executor, and from all other interest, right, or title, in my
 said means or estate."

Archibald Macfarlane died abroad in August 1761 ; and as
 he left no children, Elizabeth Spence, his widow, considering
 herself as his heir, by virtue of the disposition above re-
 cited, which she caused, of this date, to be recorded in the June 10.
 commissaries books, took the whole of her husband's 1763-
 writs into her possession, where they continued till her death,
 and intromitted with the whole of his effects, without con-
 firming herself executor, or making up inventories.

Elizabeth

Elizabeth Spence died in November 1764, and, by her death, the right of succession, under the disposition above recited, devolved upon the petitioner, *Archibald Macfarlane*.

Notwithstanding this, *Alexander* and *Richard Spences*, brothers to the said *Elizabeth*, and *James Spence*, her sister, wife to *James Richardson*, seized her whole writs, and intromitted with the effects in her possession, without distinguishing between the part thereof, which descended from her late husband, and her own acquisition; and, of this date, they confirmed themselves executors, *qua* nearest of kin to the said *Elizabeth Spence*.

May 13.
1765.

The petitioners, who had reason to believe, that the effects intromitted with, amounted to a much larger sum than was acknowledged by *Elizabeth Spence's* executors, and that the whole thereof were the produce of *Archibald Macfarlane's* estate, having been unable to obtain justice in an amicable manner, brought a process before the commissaries, libelling upon *Jacobina Macfarlane's* right under the contract of marriage and disposition above recited, and concluding, 1st, For exhibition of these writs; and, 2^{dly}, For payment of 200 *l. Sterling*, as the amount of *Archibald Macfarlane's* estate, intromitted with by *Elizabeth Spence*, and, since her death, by the defenders.

The defenders appearing in this process, produced the contract of marriage, and disposition, with the confirmed testament of *Elizabeth Spence*, and a roup-roll of the effects which had been confirmed; from which it appeared, that they had been sold for 101 *l. 10 s. 5 $\frac{1}{2}$ d.*; and, at the same time, lodged their defences, importing in substance, 1st, That *Archibald Macfarlane* had died in bad circumstances, and that the whole effects left by Mrs. *Macfarlane*, were acquired since his death. 2^{dly}, That they, as her executors, had right to the estate of *Archibald Macfarlane*, of which she was absolute, but, by his disposition, the substitution of *Jacobina Macfarlane* being only conditional; in

case of her predeceasing her husband, and, consequently, evacuated by her survivance. And, *lastly*, That *Archibald Macfarlane's* estate would, at any rate, be exhausted by his wife's claims upon her contract of marriage, to which they had now right, as her executors.

It was answered for the pursuers, *1st*, That *Elizabeth Spence* had left effects to a much greater amount, than the defenders acknowledged, several articles of intromission being condescended upon, which did not appear from the confirmed testament; and that the whole of her effects had descended to her from her husband. *2dly*, The the substitution of *Jacobina Macfarlane*, failing the wife and children of her brother, was not conditional, but absolute; and that, as it had now taken place by their failure, she was clearly entitled to the succession. *3dly*, That *Elizabeth Spence* having departed from her claims upon the contract of marriage, by taking up her husband's succession, under his disposition, her heirs could not now recur to them.

In order to discover the real extent of the defenders intromissions, the commissaries appointed them to undergo a judicial examination, in the course of which, they emitted declarations, some part of which the petitioners will, in the sequel, have occasion to lay before your Lordships.

Memorials were appointed to be lodged upon the point of right, and accordingly given in by both parties: They contained nearly the same arguments with the defences and answers, but urged at greater length, particularly in that of the defenders, whose council employed much pains and learning to establish two propositions, *1st*, That by the law of *Scotland*, every substitution in movables, was only a conditional institution, to take place if the heir predeceased the testator. And, *2dly*, That *Archibald Macfarlane* appeared, from the tenor of his disposition, to have intended no more than such a conditional institution.

Of this date, the commissaries pronounced the following interlocutor: " The commissaries having considered Jan. 28.
1767.

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" the

“ the mutual memorials, and haill circumstances of the
 “ case, and, particularly, that the deceast *Elizabeth Spence*
 “ made up no titles to the movables of the deceast *Archibald Macfarlane*, in virtue of the disposition executed by
 “ him in her favours; they find, That the said movables
 “ now devolve upon the pursuer, *Jacobina Macfarlane*, in
 “ virtue of the substitution in her favours, contained in
 “ said disposition, of which movables they ordain the pursuer to give in a special condescendence.”

The defenders reclaimed against this interlocutor. Their petition, however, was in substance the same with the memorial, except that they now insisted upon *Elizabeth Spence* having defeated the substitution, by changing the *ipsa corpora* of *Archibald Macfarlane's* effects.

The commissaries, on advising this petition, with answers, adhered to their former interlocutor: And the defenders having complained to this court, by a bill of advocacy, which was presented to my Lord *Hailes*, as Or-
 Sep. 17. nary, it was, of this date, refused by his Lordship.
 1767.

The pursuer's right to her brother's effects being thus established, it remained only to show their extent; nor was this an easy matter at a distance of seven years from his death, and after his papers and effects had been successively intromitted with by his widow, and the defenders.

This much, however, was certain, that he left a house in *Leith*, of three rooms and a kitchen, which was neatly furnished, as the rooms were in use to be let to lodgers.

This fact appeared from the declarations of the defenders themselves; it was further proved, by witnesses adduced by the pursuers; and these last were even able to condescend upon such particulars of the furniture, as sufficiently showed the manner in which the house was furnished.

And the evidence upon this point was completed by the testimony of *Lilias Millar*, a rousing-woman; who, after
 visiting

visiting the house, by appointment of the commissaries, deponed, That if it had been furnished in the manner described by the witnesses, the furniture would have yielded, at Mrs. Macfarlane's death, 77 l. 13 s.

On advising this proof, the commissaries, of this date, Aug. 8.
1768. found the defenders liable in payment to the pursuer of the sum of 77 l. 13 s. *Sterling*, as the value of the decessat *Archibald Macfarlane's* furniture at his death.

The defenders, probably, in the hopes that the petitioner's poverty would disable her from following them into this court, complained of this decret by bill of suspension; which being past, the cause came to depend before Lord Monboddo, as Ordinary; and it is only by obtaining the benefit of your Lordships roll, that the petitioner has been enabled to discuss it.

Of this date, parties were heard before his Lordship, and he pronounced the following interlocutor: " Before an- July 8.
1769.
" swer, ordains the suspenders to give in a particular con-
" descence of the reasons of suspension they intend to
" insist upon, and, particularly, with regard to the extent
" of the decessat Mr. and Mrs. Macfarlane's debts, paid by
" them, and of the effects belonging to the decessat Mr.
" Macfarlane, intromitted with by Mrs. Macfarlane after his
" death, before the succession opened to the suspenders,
" and that betwixt and next calling: Allows the chargers
" to see the same, and ordains them to give in answers
" thereto, in support of their charge."

The suspenders having lodged a condescence, in which they repeated the several pleas maintained before the commissaries, and stated their alledged claims upon the estate of *Archibald Macfarlane*, answers were given in for the petitioners, and the Lord Ordinary made *avisandum* to himself Feb. 10.
1770. with the condescence and answers.

While the cause thus lay at *avisandum*, the suspenders produced a reply, and along with it the contract of marriage,

age, and disposition already mentioned, the confirmed testament and roup-roll of the late Mrs. *Macfarlane's* effects, and a decret of cognition, at the instance of *John Macarthur*, against her executors, with his discharge of the sums for which it was pronounced.

Before the petitioners had an opportunity of seeing the replies and production, thus irregularly lodged, the Lord
Feb. 20. Ordinary advised the cause, and gave judgment as follows:
1770.

" The Lord Ordinary having considered this condescendence, answers, and replies, finds, That the whole sum charged is exhausted by Mrs. *Macfarlane's* claims upon her contract of marriage, which cannot be understood to be discharged by her husband's disposition in her favours, even though she had accepted of that disposition, of which there is no evidence: Therefore, suspends the letters, *simpliciter*, and decerns."

A representation being offered against this judgment, and parties heard upon the grounds of it, the Lord Ordinary
July 21. refused the desire thereof, and adhered.

1770. On advising another representation, his Lordship pronounced the following interlocutor: " The Lord Ordinary

Aug. 9. 1770. " having considered this representation, refuses the desire of the same, and adheres to his former interlocutors; superseding extract to the 12th day of *November* next: And as this representation has answered the purpose of delaying an extract in this session, and as the cause has been so often laid before the Lord Ordinary, recommends to the lawyer and agent for the representers, not to delay the course of justice any longer, by further applications to the Lord Ordinary, but to go to the inner-house, if they think proper."

The facts which have been already mentioned, with others, which shall be noticed, leave little doubt that the effects proved to have been intromitted with by *Elizabeth Spence*, made but a small part of her husband's fortune.

Even

Even that small part is an object of importance to the petitioner and her family, whose circumstances greatly require an accession of this kind; and it cannot be disputed, that she has a much more natural claim to the estate of her brother, than the heirs of his wife, who brought only 400 merks into the common stock, a sum by no means equal to the expence of his taking up family, and supporting it during the subsistence of the marriage.

Having mentioned these circumstances as an apology for laying the cause before your Lordships, the petitioner will now proceed to state the grounds, from which she expects to obtain an alteration of the Lord Ordinary's judgments.

In the pleadings before the Ordinary, and in their condescendence, the suspenders, before resorting to the claims sustained by these interlocutors, insisted upon the other pleas which had been maintained before the commissaries, and on alledged want of proof, as to the value of *Archibald Macfarlane's* effects.

All these pleas being disregarded by the Lord Ordinary, it is unnecessary for the petitioner to argue upon them; though, it is believed, a very few words will satisfy your Lordships, that they were entirely destitute of foundation.

And, 1st, The plea in point of law, that a settlement of moveables, failing one, upon another, imported only a conditional institution of the latter, in case the former died before the testator, deserves no regard.

It may be true, that in the early periods of our law, these clauses were thus constructed, after the example of the *Roman* law: But your Lordships well know, that a contrary rule had always taken place as to substitutions in tailzies, and that it is now extended to those in bonds, contracts of marriages, and testamentary deeds. Many decisions to this purpose, are cited in the Dictionary, vol. 2. p. 395. voce *Substitute and Conditional Institute*: And, agreeably to these, in the late cases of *Campbell* contra his Sister, 13th

June 1740; Creditors of *Garrioch* contra *Elizabeth Cairns*, 12th November 1742, being No. 19th and 32d of remarkable decisions; and *William Anderson* contra *Sbiells*, 26th November 1747, observed by *Falconer*; the court found such clauses to import a proper substitution, and to give a right of succession to the substitute, upon the failure of the heir, at whatever time that event might happen.

2dly, It was with still less justice, that the suspenders insisted, from the words of the disposition, that *Archibald Macfarlane* intended only a conditional institution of the petitioner, in the event of *Elizabeth Spence* dying in his own lifetime.

He disposes his effects to "*Elizabeth Spence*, and the children of the marriage, *whom failing*, to *Jacobina Macfarlane*." This, your Lordships know, is the common style of such clauses, and is always held to import a proper substitution.

The suspenders alledge, that the subsequent part of the deed shows, that *Archibald Macfarlane* was of a contrary opinion; the clause which they found upon, has been already recited, and is in these words: "With power to the said *Elizabeth Spence*, she being on life at the time of my decease, to confirm my testament, and give up inventories, intromit with, uplift and discharge, and to use and dispose of all my means and effects, and to apply the same for her own use and behoof, and for the use and behoof of our said children, by such proportions as she shall think fit; she, the said *Elizabeth Spence*, always having the sole administration of the whole, during her widowity, and the nonage of her children; and, failing of them, to her own use and behoof allennarly; hereby secluding and debarring all others from the said office of executor, and from all other interest, right, or title, in my said means or estate."

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The suspenders would have the latter part of this clause understood to exclude the substitution of the petitioner, in the event of children surviving the dissolution of the marriage, but dying before *Elizabeth Spence* their mother.

And, taking it in this sense, they argue, that as *Archibald Macfarlane* did not mean the substitution to take place, in the event of the children surviving the marriage, he could as little intend that it should, in the event which has happened.

But when the clause itself is considered, your Lordships will see, that the whole of this argument proceeds upon a mistake.

The destination of *Archibald Macfarlane*'s estate was fully expressed in the dispositive part of the deed; and the purpose of this clause was not to alter or restrict that destination, but to explain the joint institution of his wife and children.

This he does, by appointing his wife, in the event of children surviving the marriage, to administrate the effects for the joint behoof of herself and children, during her widowity, and their minority; and empowering her to distribute them among the children, in what proportions she thought proper; and, upon the failure of children, he appoints her executor for her own behoof only. The words, *excluding all others from any interest in his effects*, are only meant, as a further expression of her being absolute proprietor, on the failure of children; but do not therefore import, that the substitution of the petitioner was to be thereby at an end. The nature of that substitution had been sufficiently expressed in the former part of the deed; and as there appears no intention to restrict it by this clause, your Lordships will be satisfied, that it was intended to take place, even in the event of children surviving the marriage, so soon as they and *Elizabeth Spence* failed.

3dly, It

3dly, It has been argued, that, *esto* the petitioner was a proper substitute, yet Mrs. Macfarlane, as unlimited fiar, had a power of alteration, and that she had exercised it by changing the *ipsa corpora* of the moveables.

The petitioner has no occasion to dispute Mrs Macfarlane's power of altering the settlement of her husband's estate, as she has not executed any deed for that purpose; but the notion of such an alteration being made, by changing the *ipsa corpora* of the moveables, is, with submission, too ludicrous, to require a serious answer.

4thly, Though the suspenders dispute the value of Archibald Macfarlane's furniture, it is submitted whether that has not been sufficiently instructed by the proof already stated.

It may be true, that had this question occurred recently after his death, it would have been necessary to have condescended on the particular pieces of furniture, and to have proved the value of every different piece: But, at this distance of time from his death, it was impossible for the petitioner to know the particulars of furniture which had been intromitted with by Elizabeth Spence, without confirming, or making up an inventory: The proof of the manner in which his house was furnished, and the opinion of a person of skill as to the value of its furniture, was all that it was now possible to obtain, and was therefore properly admitted by the commissaries, as the only proof which could be expected in the circumstances of this case.

Such being the other pleas insisted in by the suspenders, the petitioner hopes to have satisfied your Lordships, that they were intirely without foundation; and will only further observe, that their being maintained with so much anxiety, shows the suspenders to have had no great confidence in the justice of the claims which have been sustained by the Lord Ordinary's interlocutors, and shall now be considered by the petitioner.

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The interlocutor, 20th *February* 1770, begins with observing, that the claims on the contract of marriage, do more than exhaust the sum charged; supposing, however the principles upon which they are sustained, to be well founded, this would not be the case.

These claims are, 1st, For an annuity of 15 *l. per annum*, as the liferent of 300 *l. Sterling*, settled upon *Elizabeth Spence* in the contract of marriage: As *Archibald Macfarlane* died in *August* 1761, and *Elizabeth Spence* in *November* 1764, all that became due, was the annuity of three years, from *Martinmas* 1761 to *Martinmas* 1764, amounting to 45 *l. Sterling*; whereas, the suspenders have stated, as due on that account, 48 *l. 6 s. 6 d.*

2^{dly}, They claim the fee of 700 merks *Scots*, or 38 *l. 17 s. 9 ½ d. Sterling*, as the tocher contracted for *Elizabeth Spence*, by her father, and settled, in the contract of marriage, upon herself and her heirs, failing children of that marriage. But, supposing any part of this sum to belong to the suspenders, it must be observed, from the contract of marriage itself, that their father only paid 400 merks at the date thereof: And it is a fact which will not be denied, that the other 300 merks never were paid, having been, as appears likeways from the contract, subject to a liferent in favour of the suspender's mother, who died only the other year.

This claim, therefore, supposing it otherways well founded, can only be sustained to the extent of 400 merks, or 22 *l. 4 s. 5 ½ d. Sterling*. Accordingly, this is all which the suspenders claim in their condescendence, though, in their replies, they have chosen to forget that 300 merks of their sister's tocher remains in their own hands, and state the whole 700, as a claim upon the estate of *Archibald Macfarlane*.

From these observations, your Lordships will be satisfied, that the suspender's claims on the contract of marriage, were they

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well founded, would not exhaust the sum charged for, but leave a balance of above 10 *l. Sterling*. It is not, however, material for the petitioners to insist upon this point, because they hope to show, that these claims cannot now be sustained.

The Lord Ordinary sustained them upon two grounds, 1st, That *Elizabeth Spence's* acceptance of her husband's disposition, is not proved. And, 2^{dly}, That, if proved, it would not import a discharge of her claims upon the contract of marriage.

The petitioner shall examine both the grounds which have been assumed by his Lordship; and, in doing this, he expects to show, 1st, That *Elizabeth Spence's* acceptance of her husband's disposition, is proved: And, 2^{dly}, That this acceptance operates a discharge of her claims upon the contract of marriage.

Point I.
Disposi-
tion ac-
cepted.

First, then, the petitioner is to show, that *Elizabeth Spence* did accept of her husband's disposition.

It has been already stated, that, immediately upon her husband's death, she intromitted with the whole of his writs and effects: That she continued, during her life, to possess both the one and the other, and to dispose of them as she thought proper.

Neither of these facts have been hitherto controverted: On the contrary, your Lordships have seen, that in the process before the commissaries, the suspenders pled upon her changing the *ipsa corpora* of the moveables, which was, in other words, admitting, that she had intromitted with, and disposed of them for her own behoof.

Indeed, had the suspenders controverted the fact of her universal intromission, it could have been very clearly proved; and, independent of their admission, its truth is clearly established by facts which appear in process.

Andrew Pitcairn, doer for the suspenders, and cautioner for them in the confirmation, when judicially examined by the commissaries, was asked, "Whether he did not intro-
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“ mit with an holograph missive and obligation, granted
 “ by a gentlewoman who resided in *Jamaica*, who was the
 “ landlady or trustee, and vender of the said deceased *Ar-*
 “ *chibald Macfarlane* his effects in that island, for a very
 “ considerable sum of money due by her to him, &c. —
 “ And, in his answer to this question, he admits, “ That the
 “ defunct *Mrs. Macfarlane*, before her decease, put the ho-
 “ lograph missive into the hands of Mr. *Mac-*
 “ *neil*, merchant in *London*, in order to seek after the debt
 “ therein mentioned: That, after the defunct’s decease,
 “ the executors employed one Mr. *Innes* of *Cathlaw* to write
 “ to his correspondent at *London*, in order to get-up said
 “ missive from Mr. *Macneil*, and to sue for payment there-
 “ of, which accordingly was done; and the answer therea-
 “ nent came to *Innes*, which was by him gi-
 “ ven to the executors.”

Robert Duncan, a witness examined as to the nature of
 the furniture in *Archibald Macfarlane*’s house at *Leith*, af-
 ter having described it, adds, “ That this deponent was in *Decreet*,
 “ *Mrs. Macfarlane*’s house, after her husband’s death, when *P. 109.*
 “ she came up from *Leith*, and lived in *Scott*’s close, and
 “ did there observe the same furniture as he had formerly
 “ seen in her husband’s lifetime.”

From the facts instructed by *Pitcairn*’s declaration, and
 the deposition of this witness, independent of the suspend-
 ers admission, there can be no doubt, that *Elizabeth Spence*
 intromitted universally with the writs and effects of *Archi-*
bald Macfarlane, and applied them to her own use; and the
 only question is, Whether she did this as heir under her
 husband’s disposition, or in some other character?

By the terms of that disposition, *Elizabeth Spence* was
 absolute proprietor of her husband’s estate, under a substi-
 tution of the petitioner *Jacobina Macfarlane*: She was ap-
 pointed his executor, and expressly empowered to intromit
 with his effects. It gave her therefore an undoubted right
 to

to confirm herself executor, and was at least a colourable title for intromitting without confirmation.

In these circumstances, Mrs. *Macfarlane* intromitting with her husband's writs, disposing of his effects, and in every respect acting as his representative, it cannot be doubted, that she meant to accept of a deed by which she had right to that character, and with the contents of which she was well acquainted, unless the suspenders shall point out some other which gave her an equal title.

No other has hitherto appeared, by which she could pretend a right to any part of her husband's estate, except the contract of marriage.

By that deed, the conquest is provided to *Archibald Macfarlane* and her, in conjunct fee and liferent, and to the children to be procreate betwixt them, in fee; *whom failing, to the husband's heirs, executors, or assignies.* This termination points out the wife to be only a liferentrix; and the fee, under this provision, would devolve upon the petitioner, as heir to her brother. This deed, therefore, gave to *Elizabeth Macfarlane* only a claim of liferent, for which she was a creditor upon her husband's estate; and, consequently, she had not thereby a right to intromit with her husband's estate, and to take upon her the character of his representative.

Mrs. *Macfarlane* could acquire no right of intromitting, by virtue of her contract of marriage, without constituting the claims which it afforded her against the representatives of her husband: So far from doing this, she never so much as put it upon record, but allowed it to remain a latent deed during her life, as appears from the extract in process, which shows, that it was not put upon record till the 12th *August* 1765, almost a twelvemonth after her death. The disposition, on the other hand, was put upon record, within two years of her husband's death, which must have been at her desire, as it had fallen into her possession

session along with his other writs; and though her publishing it in that manner would have been an useless expence, if she had not intended to accept of the right which it gave her to the succession of her husband.

Further, it is observable, that during the litigation before the commissaries, the suspenders never denied Mrs. *Macfarlane's* acceptance of her husband's disposition: On the contrary, both in their defences, memorial, and reclaiming petition, the point which they chiefly laboured to establish, was, that the substitution of the petitioner evanished by her surviving *Archibald Macfarlane*, and that they were now the heirs of his estate under that deed.

Joining together all these circumstances, that *Elizabeth Spence* was only a liferenter by the contract, and a liar by the disposition; that she constituted none of her claims upon the contract; that she intromitted universally with the estate of her husband, to which the disposition alone gave a right; that this disposition was put upon record during her life, and by her directions; and that the suspenders, in the action before the commissaries, considered it as the law of *Archibald Macfarlane's* succession; it is submitted to your Lordships, that they afford irresistible evidence of her acceptance.

It has been observed by the suspenders, that Mrs. *Macfarlane's* claims upon the contract of marriage, were more than sufficient to exhaust her husband's estate; and this has been insisted upon, as a presumption against her acceptance of the succession under his disposition.

But, in the first place, your Lordships will observe, that though the petitioner has not been able to prove the other particulars, it does not necessarily follow, that the furniture of his house made the whole, or even the most valuable part of his effects. It appears from the defences offered by the suspenders in the inferior court, that *Archibald Macfarlane*, for some years preceeding his death, fail-

Decreet,
page 13-

ed to the *West Indies*, and was in use to trade in that country for his own behoof: That in his last voyage, he carried out a considerable part of his fortune in goods, for that market.

There is therefore reason to believe, that he left effects to a considerable amount, exclusive of his household furniture; or, at least, that he was supposed to have done so, which last, would be equally effectual in determining his widow to accept of the succession; and that, in fact, he left claims, which she endeavoured to make effectual, appears from what has been already stated, of the missive sent to Mr. *Macneil* at *London*.

2dly, Supposing his effects not to have exceeded the sum decerned for by the commissaries, Mrs. *Macfarlane* judged better for herself, in taking the property under his disposition, than abiding by her claims on the contract of marriage: His effects being the only fund out of which these claims could be recovered, she never could make them effectual to a greater extent; and it depended upon the accident of her life, how far they would equal it: Whereas, by taking up the succession under the disposition, she at once acquired possession of every thing which she had a chance to obtain, *as a creditor* upon the contract.

At any rate, the petitioner is not concerned with the rationality of Mrs. *Macfarlane's* conduct in this particular, was it even true, that she judged ill in taking to the right of succession under her husband's disposition: However that might afford a distant presumption against her acceptance, it cannot possibly be put in balance with the many other circumstances by which that fact is established.

Point II.
Claims on
the contract
discharged.

It remains, 2dly, to satisfy your Lordships, that Mrs. *Macfarlane's* acceptance of her husband's disposition, imported a discharge of her claims upon the contract of marriage.

The

The first of these claims was to the liferent of 300*l.* *Sterling*, and as the money had not been laid out in terms of the contract, the widow was no more than a creditor on her husband's estate, for the annualrent of that sum.

By the acceptance of his disposition, she became the representative of her husband, was universally liable to his debts, and consequently was both debtor and creditor in this obligation, which was thus lost by confusion; a mode of extinction as effectual as a discharge, or as any other method of extinguishing a debt, known in our law.

The other claim upon the contract of marriage, is to the fee of the money contracted by *Elizabeth Spence's* father, as her tocher, which is settled by the contract of marriage upon the "husband and her in conjunct fee and liferent, and to the children to be procreated betwixt them, in fee; whom failing, to the said *Elizabeth Spence*, her heirs, executors, or assignies, in fee."

It will be observed, from this part of the contract, that the fee of the 700 merks stood in *Archibald Macfarlane*, though, failing of him and the children of the marriage, it was destined to the wife and her heirs.

This being the case, *Archibald Macfarlane*, as fiar, had it in his power to alter this destination; and however such an alteration might have been challenged by the wife or children, as creditors upon the contract of marriage, no such challenge is competent to the suspenders, who, although heirs in the destination, have no *jus crediti* established in their favour, by the contract of marriage.

Indeed, if the suspenders had originally such a right, it is evident they have now lost it.

The right of succession to this subject opened to *Elizabeth Spence* by the death of her husband, and she became a creditor upon his estate, to the extent of the 400 merks. And as it has been already shown, that, by acceptance of her husband's disposition, she had right to his whole estate,
the

the right of debtor and creditor in this obligation concurred in her person, and were thereby extinguished by confusion.

The petitioners have thus, they hope, satisfied your Lordships, that *Elizabeth Spence's* claims upon her contract of marriage, having concurred in her person with the right to her husband's estate, were thereby extinguished; and, consequently, that the Lord Ordinary's interlocutor, sustaining these claims in the persons of her heirs, falls to be altered.

It remains, to take notice of some other claims which have been pled in compensation of the charge, and may possibly be again repeated.

1st, They have claimed 20 *l.* as aliment due to *Elizabeth Spence*, from the death of her husband in *August 1761*, till *Martinmas* thereafter, when the first term's annuity became current.

When your Lordships consider, that the whole amount of *Archibald Macfarlane's* fortune, as accounted for by the suspenders, was 77 *l.* 13 *s.* and that, by the contract of marriage, his widow was only provided to 15 *l.* a-year, a claim of 20 *l.* for two months aliment will appear so exorbitant, that no argument need be used for restricting it. But further, it will be observed, that this claim, as well as those upon the contract of marriage, was extinguished by her acceptance of the disposition.

2^{dly}, The suspenders claim 28 *l.* 10 *s.* 7 *d.* Sterling, as paid to creditors of Mr. and Mrs. *Macfarlanes*, upon a decret of cognition.

To this it is answered, That, upon looking into the decret, which was formerly in process, though now withdrawn, they appear to be debts of Mrs. *Macfarlane's*, and consequently affect the suspenders, as her executors, not the petitioners, the successors of *Archibald Macfarlane*.

The

The same observation applies to the claim for the sick-bed and funeral charges of Mrs. Macfarlane.

As to the expence of confirming and rousing Mrs. Macfarlane's estate, it may be true, that as the effects of Archibald Macfarlane were confirmed as belonging to her, there is a claim to be relieved of a proportion of that expence, and the petitioners are willing to do so, on its being properly ascertained.

The petitioner has now laid the merits of the present question before your Lordships, and hopes you will be satisfied, that she has a good right to the sum charged for, and that the several claims which have been pled upon by way of compensation, are without foundation.

May it therefore please your Lordships to alter the Lord Ordinary's interlocutors of the 20th February, 21st July, and 9th August 1770; to find, that the claims upon Elizabeth Spence's contract of marriage with Archibald Macfarlane, were extinguished by her acceptance of the disposition to his estate; and that the other claims of compensation are ill founded, excepting that for relief of the expence of confirming and rousing, incurred upon the estate of Archibald Macfarlane; and, with that exception, to find the letters orderly proceeded.

According to Justice, &c.

B. W. MACLEOD.

The same objection applies to the claim for the sick-
bed and funeral charges of Mrs. Macleod.
As to the expense of conveying and lodging Mrs. Mac-
leod, it may be true that as the effects of the
disease were confined as belonging to her, there
is a claim to be allowed of a proportion of that expense,
and the petitioners are willing to do so, on its being pro-
perly ascertained.
The petitioners have now laid the merits of the present case
before your Lordships and hope you will be satisfied
that she has a good right to the sum charged for, and that
the several claims which have been put upon by way of
compensation, are without foundation.

May it therefore please your Lordships to allow the
sum of £1000 to be paid to the petitioners of the 20th February,
1770, and to direct that the sum of £1000 be paid to the
petitioners the same year Elizabeth's charge, contrary of mar-
riage and Archibald's charge, and to direct that the sum of
£1000 be paid to the petitioners of the disposition to his estate,
and that the other claim of compensation be ill-
founded, excepting that for relief of the expense of
conveying and lodging, incurred upon the state of
Archibald's estate, and with that exception,
to pay the petitioners the sum of £1000.

E. W. MACLEOD.